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In the Supreme Court of the United States

DEFENDERS OF WILDLIFE AND SIERRA CLUB,
Petitioners,

v.

MICHAEL CHERTOFF,
SECRETARY OF HOMELAND SECURITY,
Respondent.

On Petition for a Writ of Certiorari to the United States District Court for the District of Columbia

BRIEF OF FOURTEEN MEMBERS OF THE U.S. HOUSE OF REPRESENTATIVES AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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BRIEF OF FOURTEEN MEMBERS OF THE U.S. HOUSE OF REPRESENTATIVES AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICI CURIAE*[1]

Amici are House Committee Chairpersons, Members of the Committee on Homeland Security, and Members representing districts in states that border Mexico. They are Homeland Security Committee Chairman Bennie G. Thompson, Energy & Commerce Committee Chairman John D. Dingell, Transportation & Infrastructure Committee Chairman James L. Oberstar, Education and Labor Committee Chairman George Miller, Rules Committee Chairwoman Louise Slaughter, Veteran Affairs Chairman Bob Filner, Intelligence Committee Chairman Silvestre Reyes, Congressman Solomon Ortiz of Texas, Congressman Sam Farr of California, Congresswoman Sheila Jackson-Lee of California, Congresswoman Susan A. Davis of California, Congresswoman Hilda Solis of California, Congressman Raul M. Grijalva of Arizona, and Congresswoman Yvette D. Clarke of New York.

The *amici* Committee Chairs believe that the waiver granted by Secretary Chertoff that is the subject of this litigation is a direct affront to the institution of Con-

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[1] Pursuant to Rule 37.2 of the Rules of this Court, *amici curiae* state that timely notice of intent to file the brief was given to and received by all counsel of record. The parties' letters of consent to the filing of this brief have been lodged with the Clerk of this Court. Pursuant to Rule 37.6 of the Rules of this Court, *amici* state that no counsel for a party has written this brief in whole or in part and that no person or entity other than the *amici* or their counsel has made a monetary contribution to the preparation or submission of this brief.

gress. In their view, the Secretary's use of the waiver authority under Section 102(c) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, as amended by the REAL ID Act of 2005, greatly undermines – and manifests an utter lack of respect for – the many laws that the *amici curiae* (and members of prior Congresses) have drafted, debated and defended, and that have been enacted by the House of Representatives and Senate and signed by the President.

The *amici* Members of the Committee on Homeland Security are concerned that Secretary Chertoff, in granting the waiver that is the subject of the current litigation (as well as three other waivers he has granted pursuant to Section 102), is abusing his authority and disregarding both congressional intent and constitutional restrictions on Executive Branch power.

The *amici* Members who represent districts in states that border Mexico have a keen interest in seeing laws be executed prudently, in a manner that respects the statutes and regulations that have protected their communities for decades. These Members are also particularly well situated to appreciate the important competing policies reflected in the Secure Fence Act, the REAL ID Act, and the dozens of laws critical to protecting the residents, environment, and historical and cultural sites in the border region.

Finally, *amici* are uniquely situated to apprise the Court of the importance of the issues presented here to the proper exercise of their constitutionally defined legislative responsibilities. Members of the U.S. Congress often make their views known to this Court in cases that raise issues concerning the preservation of

the constitutional balance of powers among the co-equal Branches of Government.[2] This is such a case.

STATEMENT

The petition for certiorari presents two significant, closely related questions concerning the fundamental limits on Congress's exercise of legislative power under Article I of the Constitution – an area of law that this Court has not addressed since 2001. See *Whitman* v. *American Trucking Associations, Inc.*, 531 U.S. 457 (2001). No doubt because of the extraordinary nature of the waiver provision challenged in this litigation, this Court has never had occasion to address the precise constitutional issues raised in this case. The ultimate resolution of those weighty questions – whether by the Court's exercise of further review or by its decision to leave in place the opinion of a single district judge as the final word concerning Congress's Article I authority – has the potential to fundamentally redefine the way federal laws are made and enforced. As Congress has eliminated intermediate appellate review of all issues, including the constitutional ones presented in this case, the only opportunity for a second look is through the certiorari process in this Court. For the reasons set forth in the petition for certiorari and below, the Court should grant review to resolve the important constitutional issues presented, to provide greater guidance concerning the meaning of Article I and the non-delega-

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[2] See, *e.g.*, Brief for Representatives Henry A. Waxman, David E. Skaggs, and Louise M. Slaughter as *Amici Curiae* in Support of Appellees, *Clinton* v. *City of New York*, No. 97-1374 (filed Apr. 3, 1998) (urging the result ultimately reached by the Court that the line-item veto was unconstitutional).

tion doctrine in this setting, and to correct the district court's flawed decision.

1. At issue in this case is the constitutionality of a statutory waiver provision that was enacted as a rider to an unrelated emergency wartime appropriations bill. See Pub. L. No. 109-13, 119 Stat. 231, § 102, *codified at* 8 U.S.C. § 1103 note ("Section 102"). Section 102 broadly confers on the Secretary of the Department of Homeland Security (DHS) "the authority to waive *all legal requirements* such Secretary, *in such Secretary's sole discretion*, determines necessary to ensure expeditious construction of the barriers and roads under this section." *Ibid.* (emphasis added). The term "all legal requirements" is sweeping and presumably includes all forms of state and local law, including state constitutions, statutes, regulations, rules, and common law. *Riegel* v. *Medtronic, Inc.*, 128 S. Ct. 999, 1007-09 (2008). It also includes all forms of federal law, including treaties, statutes, interstate compacts, regulations, court rules, and federal common law – except, of course, for legal requirements imposed by the U.S. Constitution.

In addition to granting the waiver authority, Section 102 contains the following stringent limitations on judicial review:

> (2) FEDERAL COURT REVIEW. –
>
> (A) IN GENERAL. – The district courts of the United States shall have *exclusive jurisdiction* to hear all causes or claims arising from any action undertaken, or any decision made, by the Secretary of Homeland Security pursuant to paragraph (1). A

> cause of action or claim *may only be brought alleging a violation of the Constitution of the United States. The court shall not have jurisdiction to hear any claim not specified in this subparagraph.*
>
> (B) TIME FOR FILING OF COMPLAINT. – Any cause or claim brought pursuant to subparagraph (A) *shall be filed not later than 60 days after the date of the action or decision made by the Secretary of Homeland Security.* A claim shall be barred unless it is filed within the time specified.
>
> (C) ABILITY TO SEEK APPELLATE REVIEW. – An interlocutory or final judgment, decree, or order of the district court *may be reviewed only upon petition for a writ of certiorari to the Supreme Court of the United States.*

Ibid. (emphasis added). Thus, the statute categorically bars all litigation challenging Section 102 in the state courts; categorically bars all litigation raising challenges to the Secretary's compliance with Section 102's substantive requirements (including the requirement that the Secretary's waiver be "necessary to ensure expeditious construction of the barriers and roads under this section"); bars appellate review by the United States Courts of Appeals of the federal district court's rulings on the constitutionality of Section 102 (thus ensuring that intercircuit conflicts – a major reason why this Court exercises its certiorari jurisdiction – will never develop); and strips this Court of mandamus jurisdiction and limits its review to the certiorari process. Moreover, Section 102 includes extremely short time limits – such as the 60-day filing limit – that may have the effect of insulating certain

federal constitutional claims from judicial review. This includes, for example, takings claims that do not become ripe within 60 days of the Secretary's waiver decision.

During the drastically foreshortened floor debate on Section 102, one of the undersigned *amici curiae* observed:

> To my knowledge, a waiver this broad is unprecedented. It would waive all laws, including laws protecting civil rights; laws protecting the health and safety of workers; laws, such as the Davis-Bacon Act, which are intended to ensure that construction workers on federally-funded projects are paid the prevailing wage; environmental laws; and laws respecting sacred burial grounds. It is so broad that it would not just apply to the San Diego border fence that is the underlying reason for this provision. It would apply to any other barrier or fence that may come about in the future.

151 Cong. Rec. H459, 109th Cong., 1st Sess. (daily ed. Feb. 9, 2005) (statement of U.S. Representative Jackson-Lee). A report by the nonpartisan Congressional Research Service on the use of waivers and regulation of judicial review in legislation confirmed the truth of Ms. Jackson-Lee's observation that Section 102 is "unprecedented." See Stephen R. Viña & Todd B. Tatelman, *Sec. 102 of H.R. 418, Waiver of Laws Necessary for Improvement of Barriers at Borders*, Cong. Res. Serv. (Feb. 9, 2005), at 2 (reaching that conclusion based on"a review of federal law, primarily through electronic database searches and consultations with various CRS experts"); see also 151 Cong. Rec. H554

(daily ed. Feb. 10, 2005) (statement of U.S. Representative Farr) ("Mr. Chairman, it has never been done before, waiving all labor laws, all contract laws, all small business laws, all laws relating to sacred places. It is a broad sweep, just a total repeal of all of those laws or a waiver of all those laws.").

2. This litigation arose after the Bureau of Land Management (BLM) granted a permanent right-of-way to DHS to permit it to build a fence across biologically and environmentally sensitive areas along the border between the United States and Mexico. Pet. App. 1a-2a. Defenders of Wildlife and the Sierra Club (petitioners in this Court) sued seeking preliminary and permanent injunctive relief and moved for a temporary restraining order. The district judge recognized that petitioners were likely to succeed in their challenge to BLM's decision to grant the right-of-way without fully complying with the National Environmental Policy Act (NEPA), and that BLM's decision presented a danger of harm to the public interest. It accordingly issued a temporary restraining order. Pet. App. 3a.

On October 10, 2007, the district court accordingly ordered DHS to cease building the border fence without first preparing a full Environmental Impact Statement, as required by NEPA.[3] See Pet. App. 3a. Secretary

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[3] Since 1970, NEPA has "declare[d] a national policy" seeking to encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; [and] to enrich the understanding of the ecological systems and natural resources important to the Nation.

Chertoff responded swiftly to the federal court's order. On October 26, 2007, he unilaterally concluded that the goal of constructing a fence along the border between Arizona and Mexico outweighed the policies contained in 19 different federal statutes, including the Administrative Procedure Act. See Pet. App. 5a n.4 (citing 72 Fed. Reg. 60,870). That waiver decision was reached without any public-record consultation with Congress or any of the expert federal agencies that administer the federal laws being waived, including the Environmental Protection Agency, the Department of the Interior, the Department of Agriculture, the Fish and Wildlife Service, or the Council on Environmental Quality.

"I determine," the Secretary further proclaimed in granting the waiver,

> that * * * the lands covered by the Temporary Restraining Order (TRO) signed by Judge Ellen S. Huvelle on October 10, 2007, in the case of Defenders of Wildlife et al. v. Bureau of Land Management * * * is an area of high illegal entry.

72 Fed. Reg. 60,870. Respondent Chertoff went on to conclude that "it is necessary" to "waive in their entirety" 19 federal statutes in order to complete fence construction.[4] Of the 19 statutes waived, only two –

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42 U.S.C. § 4321. Congress and the President chose to implement that policy by requiring, for all "major Federal actions," a "detailed statement" describing, among other things, "environmental impact[s]" and "alternatives" to the action to be taken. *Id.* § 4332(C).

[4] See Pet. 7 & n.3 (listing the 19 waived statutes).

NEPA and the Arizona-Idaho Conservation Act, Pub. L. No. 100-696, 102 Stat. 4571, *codified at* 16 U.S.C. § 460xx to 460xx-6 – were raised in the original lawsuit in the district court. See Pet. App. 3a.

Many of the "waived" statutes are pillars of U.S. environmental and historical and cultural preservation policy. Every one of the waived statutes was passed by both houses of Congress and signed into law by the President. Thus, each is the product of the "'single, finely wrought and exhaustively considered, procedure'" prescribed by the Constitution for enacting statutes. *Clinton* v. *City of New York*, 524 U.S. 417, 439-40 (1998) (quoting *INS* v. *Chadha*, 462 U.S. 919, 951 (1983)).

The October 26 waiver at issue in this case was the third waiver granted by Secretary Chertoff under Section 102. It was also the broadest that had been granted as of that date. The first was a September 22, 2005, waiver of seven environmental and historic preservation laws plus the Administrative Procedure Act, applicable to 14 miles of fence being constructed in the vicinity of San Diego. See 70 Fed. Reg. 55,622. The second was a January 19, 2007, waiver of eight laws plus the Administrative Procedure Act, in connection with fence construction in the Barry M. Goldwater Range. See 72 Fed. Reg. 2,535.[5] With each waiver the Secretary ominously "reserve[d] the authority to make further waivers from time to time under the authority granted to me by section 102(c) of the IIRIRA, as

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[5] The Goldwater range is an Air Force and Marine armament testing facility in southwestern Arizona. See http://www.luke.af.mil/library/factsheets/factsheet.asp?id=5062.

amended by section 102 of the REAL ID Act, as I may determine to be necessary to accomplish the provisions of section 102 of IIRIRA." 72 Fed. Reg. 60,870. Thus, the Secretary from the very beginning interpreted his delegated authority much more broadly even than the stated intent of the sponsors of Section 102, which was to expedite construction of the portion of the border fence in the San Diego area. See 151 Cong. Rec. H554 (daily ed. Feb. 10, 2005) (statement of U.S. Representative Sensenbrenner) (discussing the need to finish "plugging the hole in the fence south of San Diego").

3. After the petition for certiorari was filed in this case, the Secretary granted two waivers on April 3, 2008. These latest waivers together cover vast stretches of the U.S.-Mexico border in California, Arizona, New Mexico and Texas. See 73 Fed. Reg. 19,077 (as amended Apr. 8, 2008) (Hidalgo County, Texas); 73 Fed. Reg. 19,078 (as amended Apr. 8, 2008) (California, Arizona, New Mexico and Texas). They seem designed to test the Court's tolerance of the Secretary's far-reaching waiver authority. The broader of the two April 3 waivers defeats application of *35 statutes* (*including* the Administrative Procedure Act) (73 Fed. Reg. at 19,080). The Secretary's determination "that it is necessary that I exercise the authority that is vested in me" to waive those numerous statutes has the effect of subordinating more than a century's worth of legislation (the oldest waived statute is the Rivers and Harbors Act of 1899, 33 U.S.C. § 403) to the uni-

tary, and politically contentious, policy of building a border fence.[6]

SUMMARY OF ARGUMENT

Certiorari is warranted in this case for two distinct reasons. First, the questions raised in the petition present such a danger of confusion on matters of utmost constitutional significance that, even in ordinary circumstances, they would be deserving of this Court's attention. Second, the statutory provision at issue in this case contains restrictions on judicial review that are anything but ordinary. Because the statute eliminates intermediate appellate review of the important constitutional questions raised by the petition, the final word on those questions will be that of a single district judge unless this Court grants the petition for certiorari.

Guidance is needed concerning the permissible scope of congressional delegations of waiver authority to the Executive Branch that are subject to only limited judicial review. Delegations of waiver authority are a useful legislative tool that Congress has employed to assist in efficient and effective governance. But such delegations also present dangers of violating the Article I scheme for law-making, which operates to ensure a structural check on the concentration of power in one Branch of Government. Congress looks to this Court's

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[6] It is doubtful that the Secretary's waiver decisions would pass muster if they were reviewed for compliance with the statutory waiver standard. Notably, the waivers uniformly have been much broader than any actual challenges to DHS's actions have been. See pages 8-10, *supra*.

authoritative guidance in carrying out Congress's responsibility of complying with Article I. Because the broad waiver authority, elimination of judicial review of compliance with the statutory standard, and severe curtailment of appellate review of constitutional issues in Section 102 are unique, the only directly on-point authority – unless this Court intervenes – is the district court opinion below.

And that opinion, which again is not subject to intermediate appellate review, is wrong. Section 102 cannot be squared with this Court's non-delegation and separation-of-powers jurisprudence. Combining the features of a sweeping delegated waiver provision with an elimination of judicial review of statutory compliance (and a severe restriction on review even for constitutionality), Section 102 places in the hands of an unelected Executive Branch official the power to undo the work of Congress, without any commensurate obligation to justify, or defend, that decision. That transgresses the procedure set forth in Article I for making law. It also undermines the "intelligible principle" requirement for legislative delegations of authority. The Court should grant the petition for certiorari.

ARGUMENT

The Fundamental Constitutional Issues Raised In This Case Should Be Answered By This Court Rather Than By A Single District Judge

The issues presented by the petition for certiorari have been examined only by a single Article III judge, even though they raise fundamental questions concerning the manner in which laws are passed and executed.

There is no possibility of further review by any court except this one. That remarkable circumstance merits the granting of the petition, which in any event clearly raises "important question[s] of federal law that ha[ve] not been, but should be, settled by this Court." S. Ct. R. 10(c).

Statutory provisions authorizing administrative waivers of statutory requirements or imposing procedural regulations of judicial review – such as requiring suit to be brought in a particular venue, or limiting appellate review to a particular circuit court – can be legitimate tools of responsible governance, when used in moderation. But waiver authority granted by statute ordinarily is quite limited in scope and is often vested in an expert administrative agency that is charged with administering the underlying statute that can be waived. Here, in contrast, Section 102 of the REAL ID Act grants to Secretary Chertoff far-reaching power to waive an *unlimited* set of federal statutes, treatise, regulations, and court rules which he has *no* role in administering and as to which he has no expertise whatsoever. It does not require the Secretary even to *consult* the agencies that have the relevant expertise or authority to administer the statute. Section 102 also grants him sweeping authority to waive state laws in all of their myriad forms. Moreover, as the decision below illustrates, the line between permissible uses of administrative waiver provisions and procedural regulations concerning the scope and manner of judicial review, and constitutionally impermissible waiver provisions and the elimination of judicial review, is poorly understood. This case is a perfect vehicle for the Court to offer much-needed guidance on this fundamen-

tal constitutional question to the co-equal Branches of Federal Government.

Certiorari is also warranted for another reason. Section 102 of the REAL ID Act is deeply problematic. In addition to its grant of unprecedented waiver authority, Section 102 eliminates any form of review of a waiver decision for statutory compliance. Thus, nothing prevents respondent from granting a waiver without ever explaining why it is "necessary to ensure expeditious construction of the barriers and roads under this section." Indeed, nothing prevents Secretary Chertoff from granting a waiver when no such necessity actually exists. He is entirely free to flout the will of Congress, or even to "interpret" away Section 102's substantive requirements by suggesting that "necessary" means "convenient" or "expedient" – and Congress has provided that *no court*, state or federal, *including this Court*, can do anything about that.

The glaring flaws in Section 102 are, in *amici*'s view, structural and irremediable. The harm caused – the subordination of republican principles written into Articles I and II of the U.S. Constitution – is inherent in the violation. "Liberty is always at stake when one or more of the Branches seek to transgress the separation of powers." *Clinton*, 524 U.S. at 450 (Kennedy, J., concurring). Unless this Court grants the petition, that harm will go unremedied. Secretary Chertoff's most recent waiver decisions demonstrate that the harm will be compounded unless this Court intervenes now.

A. Guidance Is Needed Concerning The Permissible Scope Of Congressional Delegations Of Waiver Authority To The Executive Branch That Are Subject To Only Limited Judicial Review

Congress has an independent duty to evaluate the constitutionality of its own enactments. But Congress legislates with an eye toward this Court's definitive and binding interpretation of constitutional standards. Where confusion exists and this Court nonetheless stays its hand, Congress must legislate against the backdrop of that uncertainty. The result is legislation like Section 102, which presents serious constitutional difficulties.

1. Waiver provisions and reasonable procedural regulations of the scope and manner of judicial review are important arrows in the legislator's quiver. As this Court has recognized, executive waivers of statutory requirements have been used many times in the history of the Republic. See *Clinton*, 524 U.S. at 444-45 (1998) (citing statutes and interpreting decisions).[7] The ubiquity and importance of these tools in the legislative process, and the need for their continued use in the future, underscores the importance of this Court's review in this case. *Cf. Chadha*, 462 U.S. at 944 ("our inquiry is sharpened rather than blunted by the fact

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[7] See also Pet. App. 10a n.5 (listing examples); Stephen R. Viña & Todd B. Tatelman, *Sec. 102 of H.R. 418, Waiver of Laws Necessary for Improvement of Barriers at Borders*, Cong. Res. Serv. (Feb. 9, 2005), at 4-5 & nn.8-9 (listing examples).

that Congressional veto provisions are appearing with increasing frequency in statutes").

For example, waivers of NEPA's environmental review requirements are commonplace in the context of federal disaster relief efforts under provisions of the Stafford Act. See Pub. L. No. 93-288, 88 Stat. 143, as amended, *codified at* 42 U.S.C. §§ 5121-5206. By exercising a power granted in one of the listed Stafford Act provisions, the Executive Branch effects a waiver of NEPA's requirements. See, *e.g.*, 71 Fed. Reg. 14712-03 (Mar. 23, 2006) (employing "alternative arrangements" to comply with NEPA in rehabilitating critical infrastructure and observing that certain rehabilitation activities are exempted from NEPA under the Stafford Act).

Recent examples of appropriate application of the Stafford Act exemptions occurred in the context of relief efforts following Hurricanes Katrina and Rita in 2005 and 2006, respectively. See 42 U.S.C. §§ 5159 (exempting from NEPA federal actions authorized elsewhere in the statute), 5170a (authorizing President to provide federal assistance in support of state or local response efforts), 5170b (same for assistance in response to immediate threats to life and property), 5172 (authorizing President to contribute to restoration of public or certain private non-profit facilities), 5173 (authorizing President to assist in debris removal), 5192 (authorizing general federal emergency assistance to state and local governments).

Waivers such as those employed in the wake of natural disasters are without question essential tools of effective governance in emergency circumstances.

Congress will undoubtedly continue to include them in legislation with the expectation that the Executive Branch will employ them prudently. The Stafford Act reflects an appropriately restricted congressional delegation of its power to Executive Branch officials who possess the relevant expertise to make the decisions in question. Thus, for example, Section 5170a applies only "[i]n a[] major disaster" (§ 5170a); is limited to efforts to restore a facility to its pre-disaster condition (§ 5159); and applies only to an enumerated list of specified activities (§ 5170a(1)-(5)). Section 5170b has a similar structure and similarly limits the waiver authority. And sections 5172, 5173 and 5192 also carefully limit the circumstances in which NEPA waivers are permitted.[8]

Section 102, by contrast, permits a single official in the Executive Branch to waive application of every imaginable federal statute, from environmental protection to child labor laws to transportation safety.[9]

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[8] Waivers under the Stafford Act are subject to judicial review under the Administrative Procedure Act. See *Hayne Blvd. Camps Preservation Ass'n* v. *Julich*, 143 F. Supp. 2d 628, 633 (E.D. La. 2001) (citing 5 U.S.C. § 706).

[9] Two *amici* raised this precise issue during floor debate on the statute and related amendments. Representative Dingell pointed out that the bill

> would give power to the Secretary of Homeland Security to waive any public health law such as the Safe Drinking Water Act, the Clean Water Act, as well as transportation safety, hazardous materials transportation and road construction standards. In addition, it would grant DHS unchecked authority to abrogate criminal law, child labor laws, laws that protect workers, civil rights laws, ethics laws for clean

Exactly where to draw the line between a waiver provision like that in the Stafford Act – which *amici* believe restricts Executive Branch discretion sufficiently to meet the constitutional standards for delegated authority and separation of powers – and an unconstitutional waiver provision is not entirely clear under this Court's decisions. Further guidance from this Court is needed.

2. The district court's treatment of Section 102 also creates confusion regarding the appropriate legislative use of procedural regulations of the scope and manner of judicial review. Like waiver provisions, such procedural regulations of judicial review of agency actions are ubiquitous and important tools for efficient and effective governance.

A recent example is a procedural regulation of judicial review in Section 934 of the Energy Independence & Security Act of 2007, Pub. L. No. 110-140, 121

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contracting and procurement policy.

151 Cong. Rec. H561 (daily ed. Feb. 10, 2005) (remarks of Rep. Dingell). And Representative Oberstar warned that

> the Department of Homeland Security could select a contractor without competitive bidding, use undocumented workers, violate child labor laws, pay the workers less than the minimum wage, exempt contractors from Federal and State withholding; workers could be forced to put in 18-hour-days without overtime pay, in unsafe conditions, and be transported in trucks used for hazardous cargo; and * * * the Secretary [would have] discretion to have these workers construct fences and roads through private property.

151 Cong. Rec. H556 (daily ed. Feb. 10, 2005) (remarks of Rep. Oberstar).

Stat. 1492 (Dec. 19, 2007), *codified at* 42 U.S.C. § 17373. That provision requires that all appeals from claims arising under the 1997 Vienna Convention on Supplementary Compensation for Nuclear Damage must be taken to the United States Court of Appeals for the D.C. Circuit. § 17373(i)(1). Similarly, the Carbon-Neutral Government Act of 2007, H.R. 2635, 110th Cong., 1st Sess., a bill sponsored by Chairman Waxman of the House Committee on Oversight and Government Reform, includes a provision (Section 212) that regulates judicial review. It regulates total liabilities that may be imposed, the courts (federal only) that may hear claims of a violation, and the proper venue for petitions for review of agency action (restricting such review to the D.C. Circuit). Appeals in patent cases, including challenges to Patent and Trademark Office actions, have been available exclusively in the Federal Circuit for decades. See 28 U.S.C. § 1295(a)(4)(C); 35 U.S.C. § 141.

Those examples, of course, are nothing like the complete *elimination* of judicial review of the Secretary's action for compliance with Section 102 itself, or the *elimination* of all appellate review in the U.S. Courts of Appeals of even constitutional claims brought challenging Section 102. See pages 4-6, 17 n.9, *supra*.

There can be no doubt that the much more stringent limits on judicial review of Section 102 might appear expedient, especially when the decision to be reviewed is – like the Secretary's waiver at issue in this case – politically polarizing. But this Court has stated repeatedly that "Executive action under legislatively

delegated authority that might resemble 'legislative' action in some respects is * * * always subject to check by the terms of the legislation that authorized it; and if that authority is exceeded it is open to judicial review." *Chadha*, 462 U.S. at 953 n.16. Congress legislates with this critical limitation in mind. If left undisturbed, the district court's approval of Section 102's functional elimination of judicial review will undermine that understanding.

B. Section 102 Cannot Be Reconciled With This Court's Non-Delegation and Separation-of-Powers Jurisprudence

This Court's separation-of-powers and non-delegation jurisprudence of recent decades teaches two important lessons. First, legislation, including statutory repeals, may come into existence only through the procedures specified in Article I of the Constitution. *Clinton*, 524 U.S. at 439-40. Second, concentration of power in one branch of government to a degree beyond that contemplated by the Constitution presents intolerable risks of harm to individual liberty. *Chadha*, 462 U.S. at 950-51. The decision below disregards both of these crucial teachings.

1. *Chadha* held unconstitutional a provision of the Immigration and Nationality Act that allowed the House to disapprove a determination of non-deportability by the Attorney General (the Executive Branch official charged with administering the Immigration and Nationality Act). See 462 U.S. at 958-59. The risk the Court sought to avoid was the subordination of the protections provided by the constitutional requirements for legislation (with all their "cumbersomeness and

delays") to "convenient shortcut[s]." *Id.* at 958. If that statute was interpreted to amount to amendment or repeal of the existing provision of the act, it still violated Article I, because "[a]mendment and repeal of statutes, no less than enactment, must conform with Art. I." 462 U.S. at 954.

Chadha dealt specifically with Congress encroaching on Executive Branch prerogatives through a violation of the Presentment Clause of Article I. But it cannot be disputed that abuse of Executive Branch authority – like that at issue in this case – was a primary concern of the framers of our Constitution, then only recently freed from rule by the British Crown. The 56 signatories to the Declaration of Independence agreed that "[t]he history of the present King of Great Britain is a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute Tyranny over these States." U.S. Decl. of Indep.; see also *Metro. Washington Airports Auth.* v. *Citizens for the Abatement of Aircraft Noise*, 501 U.S. 252, 273 (1991) ("The abuses by the monarch recounted in the Declaration of Independence provide dramatic evidence of the threat to liberty posed by a too powerful executive."). These concerns about overreaching by the executive were echoed in other founding-era documents. See, *e.g.*, The Federalist No. 47 (Madison) at 324-26 (Jacob E. Cooke, ed., 1961) (quoted in *Chadha* v. *INS*, 634 F.2d 408, 421 n.12 (9th Cir. 1980) (Kennedy, J.)).

The legislation at issue in *Clinton* gave to the President the legislative power to repeal portions of congressional enactments. See 524 U.S. at 438 ("In

both practical and legal effect, the President has amended two Acts of Congress by repealing a portion of each."). As with the legislative veto in *Chadha*, the concern in *Clinton* for Executive Branch encroachment on the legislative function also raised substantial constitutional issues. See *id.* at 450 (Kennedy, J., concurring) ("Separation of powers was designed to implement a fundamental insight: Concentration of power in the hands of a single branch is a threat to liberty."). This case, like *Clinton*, presents the concern for Executive Branch overreaching. And in that regard, as petitioners have persuasively shown (Pet. 19-24), the unconstitutional line item veto act seemingly is indistinguishable in practical effect from the waiver provision of Section 102. Compare *Clinton*, 524 U.S. at 436 (describing the line-item-veto act) with Pet. App. 3a-4a (describing the waiver provision of Section 102).

2. The non-delegation inquiry is a specific application of the separation-of-powers analysis. It operates to ensure that the granting of authority by Congress to another branch of government does not amount to an impermissible delegation of legislative power. See *J.W. Hampton, Jr. & Co.* v. *United States*, 276 U.S. 394, 406 (1928) ("it is a breach of the national fundamental law if Congress gives up its legislative power and transfers it to the President, or to the judicial branch"). The "intelligible principle" standard that this Court announced as early as 1928, in *J.W. Hampton*, and repeated recently in *American Trucking Associations*, 531 U.S. at 474, serves two vital purposes. It ensures effective judicial review of a delegated function for compliance with the statutory criteria. It also ensures political accountability.

The court below concentrated on the principle advanced in Section 102 – "necessary to ensure expeditious construction of the barriers and roads under this section" – and concluded that it was a sufficient "intelligible principle" under this Court's precedents to render the delegation permissible. Pet. App. 15a. That ruling ignored a key component of the intelligible principle standard: the availability of judicial review of compliance with the constraining principle set forth in the statute. Without such review, the Secretary's decision "in such Secretary's sole discretion" has the force of law. Nothing would permit a court to "'ascertain whether the will of Congress has been obeyed.'" *Touby* v. *United States*, 500 U.S. 160, 168-69 (1991) (internal quotation omitted). The critical question under this Court's precedents, then, is not merely whether the statute provides an "intelligible principle." It is whether the exercise of delegated authority is functionally reviewable for compliance with the statutory standard. Section 102 crosses the line between a reasonable procedural regulation, and an impermissible elimination, of judicial review.

The district court also ignored the second rationale behind the "intelligible principle" standard. An excessively broad delegation is an exercise in passing the proverbial buck. It gives to an administrative official, who is not answerable for his decisions to the electorate, the authority to make the difficult political decisions Congress and the President might wish to avoid. The waivers implemented by Secretary Chertoff in this case (and his other waivers) are actions that might be politically problematic to achieve through the Article I legislative process. But "[f]ailure of political

will does not justify unconstitutional remedies." *Clinton*, 524 U.S. at 449 (Kennedy, J., concurring).

To be sure, political expedience is not the only possible justification for delegated authority. Delegation can also be efficient. The broad waiver in Section 102 allows Congress to avoid hearings, debates, and fact-finding on the "necessity" to waive application of 35 federal statutes. But the efficiency rationale no more supports an unconstitutional delegation than does the failure of political will. "[T]he fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution." *Chadha*, 462 U.S. at 944.

The questions presented by the petition are of such weighty constitutional moment, and are so cleanly presented on the record below, that the case is a perfect vehicle for this Court's review. The decision by the single district judge below is incorrect and appellate review is needed. Only by granting certiorari can this Court ensure that its co-equal Branches of Government have the guidance they need to discharge their functions in ways that respect the constitutional rights of all individuals and organizations in the United States, which *amici* are charged with protecting.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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